

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID GOLAY)	
Claimant)	
VS.)	
)	Docket No. 1,034,791
CROSSLAND CONSTRUCTION CO., INC.)	
Respondent)	
AND)	
)	
VALLEY FORGE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appealed the January 15, 2010 Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on April 6, 2010.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Wade A. Dorothy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an April 17, 2007 accident. In the January 15, 2010 Award, ALJ Klein determined claimant was entitled to receive permanent disability benefits based upon a 10 percent whole body functional impairment only. The ALJ found claimant was off work for reasons other than his work injury and, therefore, limited the award to that for the 10 percent whole body functional impairment.

Claimant contends ALJ Klein erred. Claimant argues he is permanently and totally disabled and maintains the testimony of Dr. Edward J. Prostic, Dr. John D. Pro, Karen Crist Terrill and his own testimony support that assertion. In addition, claimant maintains he has

sustained a 40 percent whole body functional impairment. If the Board finds claimant is not entitled to receive a permanent total disability award, claimant asserts he is entitled to receive benefits for a 79 percent work disability,¹ which is based upon a 100 percent wage loss and a 58 percent task loss.

Respondent contends claimant is not entitled to any award of permanent partial disability benefits or permanent total disability benefits. In support of that contention, respondent points to the opinions of Dr. Paul S. Stein and Dr. T. A. Moeller. Respondent argues the opinions of Dr. Prostic, Dr. Pro and Ms. Terrill should be disregarded as their opinions are based on incorrect information or assumptions.

The issue before the Board on this appeal is what is the nature and extent of claimant's work-related injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On April 17, 2007, while working as a construction worker for the respondent, claimant injured himself while team lifting 600-pound rebar panels. While lifting the panels, claimant felt a sharp pain in his low back and right leg.² Claimant immediately advised his supervisor of the accident. Respondent sent claimant to Dr. Black at St. John's Work Partners in Joplin, Missouri. Dr. Black prescribed physical therapy and pain medication and released claimant with restrictions. Claimant was placed on restrictions of minimal stooping, bending, twisting, pushing, and no lifting more than 20 pounds and no climbing.³ Claimant worked per the work restrictions and returned to St. John's Work Partners on April 26 and May 10, 2007.

During the May 10, 2007 visit to St. John's Work Partners, claimant was seen by Dr. Briggs. Claimant's elevated blood pressure was noted at that visit. Claimant was advised to see his personal physician regarding his blood pressure, to stop all pain medications and to follow up when his blood pressure was under control. Claimant's elevated blood pressure resulted in a coronary artery stent placement.

¹ A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

² Golay Depo. (Cont. of R.H., June 30, 2009) at 13, 14.

³ *Id.*, at 15.

Claimant began experiencing dizziness after the placement of the stent. As a result, he was referred to a neurologist. Different medications were prescribed to eliminate the dizziness. No medication was successful and claimant continues to experience dizziness. Claimant initially testified he had not experienced dizziness prior to the placement of the stent.⁴ However, the evidence shows claimant experienced dizziness after a 1997 heat stroke.⁵

Claimant returned to St. John's Work Partners on August 8, 2007. He was prescribed more physical therapy but was told he needed clearance from his cardiologist and neurologist in order to return to work and do the therapy. Claimant received clearance from his cardiologist but not from his neurologist. Claimant did not return to St. John's Work Partners after August 8, 2007.

Claimant describes his low back pain as excruciating. He has also described shooting pain and numbness in his legs.⁶ Claimant began taking morphine in early 2009 to manage his pain. Claimant has not worked since May 10, 2007.

Claimant began receiving Social Security disability benefits in the early 2000s, backdated to 1997. It appears benefits were based on claimant's diagnosis of bipolar disorder. Claimant had several previous workers compensation claims: May 1986 for low back strain, November 1988 for neck and chest injury, May 1993 for low back injury, July 1997 for heat stroke and June 2000 for a right ankle injury. All these claims were settled.

At the request of claimant's attorney, Dr. Edward J. Prostic, an orthopedic surgeon, examined the claimant on June 25, 2007, and June 13, 2008. Dr. Prostic opined that claimant sustained a work-related injury to his low back aggravating preexisting disc disease either at L5-S1 or at L4-L5 with predominantly S1 radiculopathy.⁷ Dr. Prostic also suspected psychological decompensation. Dr. Prostic provided a 20 percent body as a whole physical impairment based on the *AMA Guides*.⁸ When combining that rating with the 25 percent psychological impairment rating provided by psychiatrist Dr. John D. Pro, whom claimant saw at the request of his attorney, Dr. Prostic rated claimant as having a 40 percent body

⁴ Golay Depo. (Apr. 17, 2009) at 17, 18.

⁵ *Id.*, at 35.

⁶ *Id.*, at 40, 41.

⁷ Prostic Depo. at 8.

⁸ *Id.*, at 15. The *AMA Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

as a whole impairment. Utilizing the vocational information prepared by vocational rehabilitation consultant Karen Crist Terrill, Dr. Prostic opined claimant had a 58 percent task loss considering the restrictions he placed upon claimant. Dr. Prostic also opined claimant is not able to perform substantial and gainful employment and is permanently and totally disabled.⁹

It should be noted that Dr. Prostic did not know claimant was on Social Security disability; did not review claimant's medical records prepared before April 17, 2007; and utilized the Range of Motion methodology when rating the claimant's physical impairment.

Dr. John D. Pro, a psychiatrist, evaluated claimant at the request of claimant's attorney on January 22, 2009. Dr. Pro's diagnoses included adjustment disorder with depressed mood. Dr. Pro opined the April 17, 2007 injury caused the adjustment disorder with depressed mood.¹⁰ Using the *AMA Guides*, Dr. Pro rated claimant as having a 40 percent psychological impairment with 15 percent preexisting, which results in a 25 percent body as a whole psychological impairment. As to claimant's ability to engage in substantial and gainful employment, Dr. Pro opined:

Also, when his orthopedic impairment, as outlined by Dr. Prostic, is combined with his current level of disability, then in my opinion, the resulting disability precludes employment. However, I would leave the final decision regarding his employability to a vocational specialist. He does have some college education, so he might be able to participate in vocational rehabilitation and learn further computer skills. However, from a practical standpoint, no reasonable employer would hire Mr. Golay given his degree of back pain at this time. In my opinion, from a practical standpoint, he is permanently and totally disabled.¹¹

Dr. Pro's report and opinions are based on self-reported information by the claimant. Some of the information provided was inconsistent and inaccurate. The claimant did not report prior back problems and denied heavy alcohol use. This information provided by the claimant is not accurate.

At the request of respondent and its insurance carrier, Dr. T. A. Moeller, a clinical psychologist, evaluated the claimant on July 13 and August 26, 2009. Dr. Moeller diagnosed claimant as malingering as to the psychological injury. Consequently, Dr. Moeller opined that claimant did not sustain any type of psychological impairment that was caused or exacerbated by the April 17, 2007 work injury.

⁹ Prostic Depo. at 17.

¹⁰ Pro Depo. at 15.

¹¹ *Id.*, Ex. 2 at 6.

Claimant's attorney referred claimant to Karen Crist Terrill, a licensed rehabilitation professional, to determine if claimant was able to engage in substantial and gainful employment and to determine the tasks involved in claimant's past work. Ms. Terrill determined there were 50 nonduplicative tasks related to claimant's past work. She also opined, when considering the opinions of Dr. Pro and Dr. Prostic, the claimant was unable to engage in any type of substantial and gainful employment and, accordingly, is permanently and totally disabled.

Dr. Paul S. Stein, a neurological surgeon, examined claimant on July 7, 2009, at the request of respondent and its insurance carrier. He diagnosed claimant with a lumbar strain/sprain injury and assigned him a DRE Lumbosacral Category II, 5 percent whole person impairment, under the *AMA Guides*.¹² In Dr. Stein's opinion, the 5 percent impairment is completely preexisting and there was no additional impairment from the April 17, 2007 accident. Dr. Stein opined that claimant could work with certain restrictions. Dr. Stein provided the following restrictions: (1) no lifting more than 40 pounds with any single lift up to twice per day, 30 pounds occasionally and 20 pounds frequently; (2) avoid repetitive lifting from below knuckle height; (3) avoid frequent repetitive bending and twisting of the lower back and (4) no standing or walking more than 1 hour at a time without the opportunity to sit for at least 15 minutes.¹³ Utilizing the restrictions he placed on claimant, Dr. Stein found the claimant had a 50 percent task loss.¹⁴ These restrictions are related to the April 2007 injury to the extent they are greater than the previous restrictions placed on the claimant.

During the depositions of Dr. Stein and Dr. Moeller, claimant's attorney made a running objection as to medical hearsay. The ALJ failed to rule on this objection, which necessitates a ruling at this juncture in the proceeding. K.S.A. 44-519 precludes the admission of medical reports of health care providers unless the reports are supported by testimony of the health care providers. Both Drs. Stein and Moeller reviewed medical records of various health care providers but none of those records were offered into evidence. Claimant's running objection is overruled.

This is a somewhat unusual case in that the experts' opinions as to claimant's condition and his ability to work are so divergent. Claimant's experts opined claimant is permanently and totally disabled and respondent's experts opined claimant has sustained no impairment as a result of the April 17, 2007 accident. From the Board's perspective, a court-ordered independent medical examination (IME) would have been appropriate in this

¹² Stein Depo. at 34.

¹³ *Id.*, Ex. 2 at 7, 8.

¹⁴ *Id.*, at 29.

case. No such IME was ordered, so the claimant's testimony and the parties' experts' opinions, testimony and medical reports must be weighed and balanced by the Board to determine the nature and extent of claimant's work-related injuries.

Claimant is not a good historian. Throughout the record, the claimant is inconsistent as to relevant facts and information. Claimant initially testified he began working for the respondent in January 2007 but he later indicated he started on March 18, 2007. Claimant's application for employment is dated March 17, 2007. The conclusion is claimant did not begin working for respondent until sometime subsequent to March 17, 2007. Claimant testified he experienced no dizziness before April 2007. He later admits he had dizziness after his 1997 heat stroke accident. Claimant's testimony as to his alcohol use is equally inconsistent. He testifies to having a couple of beers a week then admits to excessive use several years before the 2007 accident. Claimant also denied having hallucinations in the past. The record reflects he experienced hallucinations in 1997.

More troubling than claimant's inconsistent testimony is the incomplete and inconsistent information he provided to the health care providers who testified in this matter.

Claimant's medical history before 2007 is extensive. Briefly, in 1984 the claimant was found to have a coccygeal fracture and he was hospitalized complaining of spasms in his lower back. In 1986, claimant was treated for low back pain radiating down both lower extremities. He was assessed a 5 percent impairment. In 1993, claimant was treated for a lumbar strain and received a 2 percent rating. Work restrictions were given at that time prohibiting frequent bending and lifting of more than 30 pounds. Beginning in 1997, a neurologist treated claimant for severe headaches, disorientation, dizziness, ringing in his ears and flashlike spots in his vision. In 1997, claimant was hospitalized for rapid and pressured speech and flight of ideas. He was diagnosed with bipolar disorder at that time. During a 1998 neurological consultation, claimant complained of difficulty with memory and personality change, dizziness, anxiety, depression and paranoia. In 2003, claimant was hospitalized complaining of alcohol withdrawal tremors. In 2004, claimant presented at the emergency room unresponsive after heavy alcohol intake.

Dr. Prostic did not have the opportunity to review claimant's medical records prepared before April 2007. This would not be as problematic had claimant accurately disclosed his medical history to Dr. Prostic. Claimant also failed to disclose his mental health history to Dr. Prostic on June 25, 2007. Dr. Prostic was not aware of claimant's Social Security disability benefits until he was questioned about the same at his deposition. Finally, when asked by Dr. Prostic about prior back difficulties, claimant denied any.

Dr. Pro also did not have the opportunity to review past medical records of the claimant. Again, the claimant provided inaccurate and incomplete information to Dr. Pro.

When asked by Dr. Pro about previous back problems, claimant denied any. Claimant did not advise Dr. Pro that he had experienced dizziness prior to 2007.

Claimant also provided incomplete information regarding his medical history to Dr. Stein. Claimant reported to Dr. Stein that he had pulled a muscle in his lower back at the age of 17 but that he had fully recovered and he had no problem with his back until the 2007 accident. He also denied any history of alcohol abuse.

Unlike Dr. Prostic and Dr. Pro, Dr. Stein had the benefit of obtaining a more accurate picture of claimant's past medical history from past medical records. The information Dr. Stein gleaned from those records and the information he obtained through examination and evaluation of the claimant allowed him to obtain a more accurate picture of claimant's present medical condition.

Dr. Moeller reviewed claimant's past and present medical records. Again, inconsistencies between claimant's self-reporting information and the medical records were discovered. Claimant denied any history of alcohol abuse. Medical records show otherwise. Like Dr. Stein, Dr. Moeller's extensive review of claimant's past medical records provided an opportunity for him to obtain a more accurate picture of claimant's present psychological condition.

For the reasons stated above, the opinions of Dr. Stein and Dr. Moeller are found to be more credible than those of Dr. Pro and Dr. Prostic. Dr. Moeller opined that claimant did not sustain any psychological impairment as a result of the April 17, 2007 accident. The Board adopts Dr. Moeller's opinion.

Dr. Stein gave the claimant a 5 percent whole body impairment for his low back condition. However, he found that it was completely and wholly preexisting. Accordingly, Dr. Stein opined there was no additional functional impairment from the April 2007 accident. The Board adopts Dr. Stein's opinion.

After careful review and consideration, the Board finds and concludes that claimant sustained no permanent partial impairment as a result of the April 17, 2007 accident.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹⁵ K.S.A. 2009 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the January 15, 2010 Award of ALJ Klein should be modified as follows:

1. Claimant sustained no additional functional impairment from the April 17, 2007 accident.
2. Claimant sustained no permanent partial impairment as a result of the April 17, 2007 accident.
3. Claimant is entitled to payment of his past authorized medical expenses related to his April 17, 2007 accident and any verified unauthorized medical expenses up to the statutory maximum.
4. Future medical benefits may be considered upon proper application to the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge